Wui Kuang Liang v Government of Malaysia & Anor

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–03 OF 2004–III(I)
CLEMENT SKINNER J
8 FEBRUARY 2006

Civil Procedure — Striking out — Defence — Whether application must be refused if made after case was set down for trial — Whether defence was frivolous and vexatious defence which was raised to prejudice or delay fair trial — Subordinate Courts Rules 1980 O 14 r 21

Civil Procedure — Striking out — Statement of claim — Whether plaintiff's statement of claim disclosed reasonable cause of action

Civil Procedure — Summary judgment — Application for — Whether sessions court judge could go beyond pleadings and looked at evidence adduced by respondents — Whether issues raised were suitable to be decided on affidavits of the parties without trial — Whether summary judgment should have been granted — Subordinate Courts Rules 1980 O 14 r 21(2)

The plaintiff ('the appellant') was a businessman and in March 2001 had sold some food products to a trader from Indonesia. The Indonesian trader had arranged for his own lorries to take delivery of the goods sold to him. On 28 March 2001, one of the lorries ('the vehicle') was on its way to Indonesia via Tebedu, Serian when it was inspected by officers of the second respondent and was found to be carrying a load in excess of the maximum weight allowed in the permit issued by the Commercial Licensing Board to the vehicle. On being served the summons, the appellant wrote to the second respondent on 23 April 2001 explaining that he was only the seller of the goods on the lorry and had nothing to do with the use of the vehicle on which the goods were being carried. On 8 August 2001, the appellant appeared at the magistrate's court where he pleaded not guilty to the charge. On the case coming on for trial on 6 November 2001, the second respondent applied for the charge to be withdrawn against the appellant. After obtaining the discharge, the appellant's lawyers wrote to the second respondent requesting for compensation to be paid to the appellant for the loss and suffering caused him for his alleged malicious prosecution. On receiving no response from the second respondent, the appellant commenced this suit alleging that the second respondent as the servant or agent of the first respondent had maliciously and without reasonable and probable cause prosecuted him. The appellant then applied to strike out the respondents' defence. At a later date, the respondents also filed an application to strike out the appellant's writ of summons and statement of claim. The learned sessions court judge held that an application to strike out a defence could not be made after an action had been set down for trial and

on this ground alone dismissed the appellant's application. With regard to the respondents' application, the learned sessions court judge allowed it on two grounds: (1) the appellant, being the 'consignor' of the goods, could be considered to be a person caught by s 19(4) of the Commercial Vehicles Licensing Board Act 1987 ('the Act'), in that, he could be regarded as a person falling within the definition of the words '… any person using, causing or permitting the use of a vehicle …'. Therefore, according to the sessions court judge 'it cannot be said that the discretion of the Public Prosecutor to charge him in this case was wrongly or maliciously exercised'; (2) the appellant had rightly been granted only a discharge not amounting to an acquittal by the magistrate. Accordingly, the sessions court judge allowed the respondents' application and struck out the plaintiff's summons and statement of claim with costs. Hence, this appeal.

Held, allowing the appeal against decision of sessions court judge in striking out of claim:

(1) Although O 14 r 21 of the Subordinate Courts Rules 1980 ('the SCR') states that an application may be made under the rule 'at any stage of the proceedings', case law shows that an application under this rule should be made promptly, usually before the close of pleadings and will be refused where it is made after the case is set down for trial, as was the case here (see para 17); *Jamir Hassan v Kang Min* [1992] 2 MLJ 51 followed.

(2) Given the fact that goods sold by the appellant were found on the overladen lorry in question and given also that in resisting the appellant's application, the appellant had produced a Customs Declaration Form showing that the appellant was the 'consignor' of the goods, it could not be said at this stage of the proceedings that the respondents' defence of having taken action against the appellant in accordance with the law under s 19(4) of the Act was a frivolous and vexatious defence which was raised to prejudice or delay the fair trial of this action or in abuse of the process of the court. Accordingly, there was no reason to interfere with the decision of the learned sessions court judge in dismissing the appellant's application to strike out the respondents' defence (see para 18).

(3) Pleadings would only be struck out in plain and obvious cases. So long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff was unlikely to succeed at the trial was no ground for striking out. The appellant's statement of claim in this case abundantly disclosed a reasonable cause of action (see para 20); *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 followed.

(4) Contrary to the express provisions of O 14 r 21(2) SCR as well as the principle that only the pleadings are to be looked at in an application of this nature, the learned sessions court judge went beyond the pleadings and looked at the evidence adduced by the respondents in the form of the Customs Declaration to conclude that the appellant was a consignor. In so doing she had fallen into error (see para 22).

(5) Even though s 19(4) might apply to a 'consignor' of goods, for the appellant to be caught by the section, the court must still go one step further to arrive at a finding that the appellant had, as 'consignor', 'caused' or 'permitted' the vehicle to be used in breach of its licence conditions. The court below was not in a position, without having heard any evidence on the matter, to come to the further finding that it was the appellant, as consignor, who 'caused' or 'permitted' the use of the vehicle and therefore was caught by the section and so had no cause of action against the respondents. There was no basis for the learned sessions court judge to strike out the appellant's claim at this stage of the case (see para 23).

(6) Here, the appellant's cause of action was for malicious prosecution, the success or failure of which action would depend on whether or not it could be shown that the second respondent instituted or carried on the proceedings maliciously or whether there was an absence of reasonable and probable cause for the proceedings, which were questions that give rise to issues of mixed fact and law which were dependent for their resolution on all the circumstances and evidence that were to be disclosed at a trial. Such questions were not suitable to be decided on disputed facts in the affidavits of the parties, and certainly could not be decided by merely looking at the pleadings only on an application under the first limb of O 14 r 21(1) SCR (see para 24).

(7) There was no question of the appellant's cause of action not having accrued yet or that it was premature (see para 25).

[Bahasa Malaysia summary

Plaintif ('perayu') adalah seorang peniaga dan dalam bulan Mac 2001 telah menjual beberapa produk makanan kepada seorang pedagang daripada Indonesia. Pedagang Indonesia itu telah mengurus lori-lori beliau sendiri untuk menghantar barangan yang dijual kepadanya. Pada 28 Mac 2001, salah satu daripada lori tersebut ('kenderaan itu') sedang dalam perjalanan ke Indonesia melalui Tebedu, Serian apabila ia disiasat oleh pegawai responden kedua dan telah didapati membawa muatan berlebihan berat maksimum yang dibenarkan dalam permit yang dikeluarkan oleh Lembaga Pelesenan Komersial ke atas kenderaan itu. Setelah diberikan saman, perayu telah menulis kepada responden kedua pada 23 April 2001 menjelaskan bahawa beliau hanya pembeli barangan atas lori itu dan tiada kaitan dengan penggunaan kenderaan itu yang mana barangan diangkut. Pada 8 Ogos 2001, perayu telah merayu ke mahkamah majistret di mana beliau tidak mengaku bersalah kepada pertuduhan. Berhubung kes yang didengar pada 6 November 2001, responden kedua memohon agar pertuduhan itu ditarik balik terhadap perayu. Setelah mendapatkan pelepasan itu peguam perayu telah menulis kepada responden kedua meminta pampasan dibayar kepada perayu kerana kehilangan dan kesengsaraan yang diakibatkan olehnya disebabkan oleh pendakwaannya yang berniat jahat. Apabila tiada jawapan diterima daripada responden kedua, perayu telah memulakan guaman ini mengatakan bahawa responden kedua sebagai pekerja atau ejen responden pertama telah dengan niat jahat dan tanpa sebab munasabah dan berkemungkinan mendakwa beliau. Perayu kemudian telah memohon untuk membatalkan pembelaan responden-responden.

Berikutan itu, responden juga telah memfailkan satu permohonan untuk membatalkan writ saman dan penyataan tuntutan perayu. Hakim mahkamah sesyen yang bijaksana memutuskan bahawa satu permohonan untuk membatalkan satu pembelaan tidak boleh dibuat selepas satu tindakan telah ditetapkan untuk dibicarakan dan atas alasan ini sahaja telah menolak permohonan perayu. Berhubung permohonan responden-responden, hakim mahkamah sesyen yang bijaksana telah membenarkannya atas dua alasan: (1) perayu, yang merupakan 'consignor' barangan tersebut, boleh dianggap sebagai seorang yang terikat oleh s 19(4) Akta Lembaga Pelesenan Kenderaan Perdagangan 1987 ('Akta tersebut'), di mana, beliau boleh dianggap sebagai seorang yang terangkum di bawah penafsiran perkataan-perkataan '… any person using, causing or permitting the use of a vehicle …'. Oleh itu, menurut hakim mahkamah sesyen, 'it cannot be said that the discretion of the Public Prosecutor to charge him in this case was wrongly or maliciously exercised'; (2) perayu telah dengan betul dibenarkan hanya satu pelepasan yang tidak membentuk satu pembebasan oleh majistret. Sewajarnya, hakim mahkamah sesyen telah membenarkan permohonan responden-responden dan membatalkan saman dan penyataan tuntutan plaintif dengan kos. Justeru itu, rayuan ini dikemukakan.

Diputuskan, membenarkan rayuan terhadap keputusan hakim mahkamah sesyen yang membatalkan tuntutan itu:

(1) Meskipun A 14 k 21 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') menyatakan bahawa satu permohonan boleh dibuat di bawah kaedah tersebut 'at any stage of the proceedings', kes undang-undang menunjukkan bahawa satu permohonan di bawah kaedah ini hendaklah dibuat dengan segera, biasanya sebelum penutup rayuan dan akan menolak jika ia dibuat selepas kes ditetapkan untuk perbicaraan, seperti dalam kes ini (lihat perenggan 17); *Jamir Hassan v Kang Min* [1992] 2 MLJ 51 diikut.

(2) Berdasarkan fakta bahawa barangan yang dijual oleh perayu didapati berada atas lori lebih muatan yang dipersoalkan dan berdasarkan juga dengan menolak permohonan perayu, perayu telah mengemukakan Borang Pengisytiharan Kastam menunjukkan bahawa perayu adalah 'consignor' barangan itu, tidak boleh dikatakan di peringkat prosiding ini bahawa pembelaan responden-responden mengambil tindakan terhadap perayu menurut undang-undang menurut s 19(4) Akta tersebut adalah satu pembelaan yang remeh dan menyusahkan untuk memprejudis atau melambatkan perbicaraan adil tindakan ini atau menyalahgunakan proses mahkamah. Sewajarnya, tidak ada alasan untuk campur tangan dengan keputusan hakim mahkamah sesyen yang telah menolak permohonan perayu untuk membatalkan pembelaan responden-responden itu (lihat perenggan 18).

(3) Rayuan akan hanya dibatalkan dalam kes-kes yang nyata dan jelas. Selagi penyataan tuntutan menunjukkan terdapat alasan untuk tindakan, fakta yang plaintif tidak mungkin berjaya dalam perbicaraan bukan merupakan alasan untuk pembatalan. Penyataan tuntutan perayu dalam kes ini menunjukkan satu kausa tindakan yang munasabah (lihat perenggan 20); *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 diikut.

(4) Bertentangan dengan peruntukan nyata A 14 k 21(2) KMR dan juga prinsip bahawa hanya rayuan yang akan dilihat dalam satu permohonan yang bersifat sebegini, hakim mahkamah sesyen yang bijaksana telah meneliti rayuan tersebut dan melihat keterangan yang dikemukakan oleh responden dalam bentuk Pengisytiharan Kastam untuk membuat keputusan bahawa perayu adalah seorang pemberi konsain. Dengan berbuat demikian, beliau telah tersilap (lihat perenggan 22).

(5) Meskipun s 19(4) mungkin terpakai kepada 'consignor' barangan, untuk perayu terikat oleh seksyen itu, mahkamah hendaklah meneliti dengan lebih mendalam untuk tiba kepada satu penemuan bahawa perayu telah, sebagai 'consignor', 'caused' atau 'permitted' kenderaan itu untuk digunakan yang melanggar syarat lesennya. Mahkamah rendah bukan dalam kedudukan, tanpa mendengar apa-apa keterangan berhubung perkara ini, untuk tiba kepada penemuan seterusnya bahawa ia adalah perayu, sebagai pemberi konsain, yang 'caused' atau 'permitted' penggunaan kenderaan itu dan oleh itu terikat oleh seksyen tersebut dan sebab itu tidak adalah kausa tindakan terhadap responden. Tiada asas untuk hakim mahkamah sesyen yang bijaksana membatalkan tuntutan perayu di peringkat kes ini (lihat perenggan 23).

(6) Di sini, kausa tindakan perayu adalah untuk pendakwaan berniat jahat, berjaya atau gagal tindakan ini bergantung pada sama ada atau tidak dapat dibuktikan bahawa responden kedua telah memulakan atau mengendalikan prosiding dengan niat jahat atau sama ada tiada kausa munasabah atau mungkin untuk prosiding ini, yang merupakan persoalan yang menimbulkan campuran fakta dan undang-undang yang bergantung pada ketetapan semua keadaan dan keterangan yang dikemukakan semasa perbicaraan. Persoalan sedemikian tidak sesuai untuk diputuskan atas fakta-fakta yang dipertikaikan dalam afidavit pihak-pihak berikut, dan semestinya tidak boleh diputuskan dengan semata-mata melihat kepada rayuan yang hanya atas satu permohonan di bawah cabang pertama A 14 k 21(1) KMR (lihat perenggan 24).

(7) Tiada persoalan bahawa kausa tindakan perayu tidak terakru lagi atau yang ia adalah pra matang (lihat perenggan 25).]

Notes

For cases on application for summary judgment, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6195–6236, 6238.

For cases on defence for striking out, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 5937–5942.

Cases referred to

Jamir Hassan v Kang Min [1992] 2 MLJ 51 (folld)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (folld)

PP v Zainuddin & Anor [1986] 2 MLJ 100 (refd)

Legislation referred to

Commercial Vehicles Licensing Board Act 1987 s 19(4)
Criminal Procedure Code s 376

Federal Constitution art 145(3)
Rules of the High Court 1980 O 18 r 19(1)
Subordinate Courts Rules 1980 O 14 r 21(1)(a)

John Shek (John Shek, Sigar, Wei Yee & Co) for the appellant/plaintiff.
Nik Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondents/defendants.

Clement Skinner J:

[1] This is the hearing of an appeal brought by Wui Kuang Liang ('the appellant') who was the plaintiff in the court below. The appeal is against the whole of the decision of the learned sessions court judge who, on 16 February 2004, dismissed the appellant's application to strike out the respondents' defence, but allowed the respondents' application to strike out the appellant's writ of summons and statement of claims on the ground that it disclosed no reasonable cause of action.

[2] The facts leading up to this appeal are these. The appellant is a businessman trading under the name and style of Chop Wi Kee and runs a shop at No 77 Ewe Hai Street, Kuching. Some time in March 2001 the appellant sold some food products to a trader from Indonesia. According to the appellant, this Indonesian trader, one Tony Ah Hui arranged for his own lorries and drivers to take delivery of the goods sold to him. The delivery note (MB2) issued by the appellant shows that the lorries that took delivery of the goods bore registration No KB9484AC and KB9056AC respectively. On 28 March 2001, one of the lorries, namely, KB9484AC was on its way to Indonesia via Tebedu, Serian when it was inspected by officers of the second respondent, ie the Jabatan Pengangkutan Jalan, and weighed. It was found to be carrying a load in excess of the maximum weight allowed in the permit issued by the Commercial Licensing Board to vehicle KB9484AC ('the said vehicle'). On weighing the said vehicle the second respondent issued a 'Sijil/Tiket Timbang Berat' numbered 569S. This ticket shows that the name and address of the owner of the said vehicle is:

CV Ikaper
Jalan Pengeran Pati Balai Kerangan
Kecamatan Sekayam Sanggau

And the name and address of the driver is:

Jari bin Pawiro
GG Sukamaju Dalam Rt. 02/RW.V
Pontianak

It is not in dispute that both the above addresses are in Indonesia.

[3] On 4 April 2001, the appellant was issued with a traffic summons ordering him to appear at the Magistrate's Court Serian on 11 Juy 2001 to answer a charge under s 19(4) of the Commercial Vehicles Licensing Board Act 1987 (amended). That section reads:

> In the case of a vehicle used for the transportation of goods and in respect of which a licence under this Act has been issued, the holder of the licence or any other person who causes or permits the vehicle to be used by any person shall, if the person who uses the vehicle fails to comply with any of the conditions attached to the licence under this section, shall be guilty of an offence and shall on conviction be liable to a fine of not less than one thousand ringgit but not more than ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

[4] On being served the summons the appellant wrote to the second respondent on 23 April 2001, through his lawyers, explaining that he was only the seller of the goods on the lorry and had nothing to do with the use of the said vehicle on which the goods were being carried.

[5] When the appellant received no reply from the second respondent, his lawyers wrote to the second respondent again on 26 May 2001 on the matter. Again there was no reply from the second respondent.

[6] On 11 July 2001, the appellant appeared at the Magistrate's Court Serian when the case was adjourned to 8 August 2001.

[7] On 8 August 2001 the appellant appeared at the Magistrate's Court, Serian when his plea was taken. He pleaded not guilty to the charge and was released on bail of RM1,000 without any surety. The case was fixed for hearing on 6 November 2001.

[8] On the case coming on for trial on 6 November 2001, the second respondent applied for the charge to be withdrawn against the appellant whereupon the magistrate ordered that the appellant be discharged, such discharge not amounting to an acquittal. Apparently, no reasons were given for the withdrawal and it is not disputed that till today the appellant has not been re-charged for the alleged offence.

[9] After obtaining the discharge, the appellant's lawyers wrote to the second respondent requesting for compensation to be paid to the appellant for the loss and suffering caused him for his alleged malicious prosecution.

[10] On receiving no response from the second respondent, the appellant commenced this suit at the Sessions Court Kuching on 21 January 2002 alleging that the second respondent as the servant or agent of the first respondent had maliciously and without reasonable and probable cause prosecuted him. The appellant claimed against the respondents special damages (particulars of which were set out in his statement of claim) as well as general damages.

[11] The respondents filed a defence dated 6 May 2002 in which they averred that the charge against the appellant was withdrawn on the instructions of the Public Prosecutor and that they need not give any reasons for so doing. The respondents also maintained that they had taken action against the appellant in accordance with the law, in particular, s 19(4) of the Commercial Vehicles Licensing Board Act 1987 and prayed for the appellant's claim to be dismissed with costs.

[12] The appellant then applied to strike out the respondents' defence under O 14 r 21 of the Subordinate Courts Rules 1980 ('the SCR') on the ground that it was (i) scandalous, frivolous and vexatious; (ii) it prejudices, embarrasses and delays the fair trial of this action; and (iii) it is an abuse of the process of the court. A

[13] At a later date the respondents also filed an application under O 14 r 21 of the SCR to strike out the appellant's writ of summons and statement of claim under the first limb of the rule i.e. on the sole ground that it discloses no reasonable cause of action. B

[14] The applications came up for hearing together. The learned sessions court judge dismissed the appellant's application. In her ruling, the learned sessions court judge drew attention to the fact that the appellant's application had been filed only after he had applied by notice and obtained directions for the trial of this case, including an order fixing this case for trial on 26 July 2004. Accordingly, the learned sessions court judge held that an application to strike out a defence could not be made after an action had been set down for trial and on this ground alone dismissed the appellant's application. C D

[15] With regard to the respondents' application the learned sessions court judge allowed it on two grounds. In doing so she first considered the 'legality of the traffic summons'. After referring to s 19(3) (sic) (which is in fact the wrong section) of the Act the learned sessions court judge was of the view that the appellant, being the 'consignor' of the goods, could be considered to be a person caught by s 19(3), in that, he could be regarded as a person falling within the definition of the words '…. any person using, causing or permitting the use of a vehicle….' found in s 19(3) (sic) of the Act. Therefore, according to the learned sessions court judge 'it cannot be said that the discretion of the Public Prosecutor to charge him in this case was wrongly or maliciously exercised'. Although I will return to this point shortly, it should be noted here that the learned sessions court judge was able to refer to the appellant as the 'consignor' of the goods only because the second respondent (through the affidavit of its officer one Mora Bait, affirmed on 26 August 2002) had produced as an exhibit in the proceedings a Royal Malaysian Customs and Excise Department Form in respect of 'Goods to be Exported' in which the appellant was named as 'consignor' and Tony Ah Hui as 'consignee'. A further comment that I would make at this stage is that even though the learned sessions court judge referred to the wrong sub-section of the law in her judgment, I do not think the error was fatal because s 19(4) of the same Act also uses the words 'causes' or 'permits' and so these words are common elements to a charge under either section. E F G H

[16] The second ground relied on by the learned sessions court judge was that the appellant had rightly been granted only a discharge not amounting to an acquittal by the Magistrate. The learned sessions court judge noted that such an order was in accordance with the Supreme Court decision in *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100. The learned sessions court judge went on to say that since art 145(3) of the Federal Constitution read with s 376 of the Criminal Procedure Code vested in the Public Prosecutor the sole discretion to institute, conduct or discontinue any proceedings for any offence, she found that 'the discretion to charge and to I

withdraw the charge against the plaintiff has not been proven to have been withdrawn maliciously'. Accordingly, she allowed the respondents' application and struck out the plaintiffs summons and statement of claim with costs. Hence, this appeal.

[17] I will now consider the merits of the appellant's appeal. First, his appeal against the decision to disallow his application. In my judgment the learned sessions court judge was not wrong in this part of her decision. Order 14 r 21(1) of the SCR is in pan materia with O 18 r 19(1) of the Rules of the High Court 1980. Although both rules state that an application may be made under the rule 'at any stage of the proceedings', case law shows that an application under this rule should be made promptly, usually before the close of pleadings and will be refused where it is made after the case is set down for trial, as was the case here. For this, see the decision of Haidar J (as he then was) in *Jamir Hassan v Kang Min* [1992] 2 MLJ 51, a decision with which I respectfully agree.

[18] Quite apart from the above reason, I do not think the learned sessions court judge was wrong to dismiss the appellant's application because given the fact that goods sold by the appellant were found on the overladen lorry in question and given also that in resisting the appellant's application the appellant had produced a Customs Declaration Form showing that the appellant was the 'consignor' of the goods, I do not think it can be said at this stage of the proceedings that the respondents' defence of having taken action against the appellant in accordance with the law under s 19(4) of the Commercial Vehicles Licensing Board Act 1987 is a frivolous and vexatious defence which was raised to prejudice or delay the fair trial of this action or in abuse of the process of the court. Accordingly, I see no reason to interfere with the decision of the learned sessions court judge in dismissing the appellant's application to strike out the respondents' defence.

[19] With regard to the learned sessions court judge's decision to allow the respondents' application and thereafter strike out the appellant's claim, it is my finding that she had taken the wrong approach in deciding the respondent's application as a consequence of which she had misdirected herself in law and in fact in doing so. I say so for the following reasons.

[20] Even though the learned sessions court judge had heard the two applications together, she should have reminded herself that different considerations apply to each application. Whereas it was permissible to look at the affidavits of the parties and the documentary evidence they produced when deciding the appellant's application, such a course was not open to her when considering the respondents' application. The respondents had applied to strike out the appellant's claim solely under the first limb of O 14 r 21(1)(a) of the SCR, ie that the appellant's statement of claim disclosed no reasonable cause of action. Sub-rule (2) of O 14 states that no evidence shall be admissible on an application under para (1)(a). Accordingly, in deciding the respondents' application only the pleadings are to be looked at. In his statement of claim the appellant had, in my view, set out sufficiently all the material facts giving rise to his cause of action. He had pleaded the fact of the charge being brought against him at the Magistrate's Court Serian and of the termination of those

proceedings in his favour. He had also pleaded that he had informed the respondents that the said vehicle was not his and neither did he know the driver of the same and that his lawyers had explained the whole incident to the second respondent. He also pleaded that the second defendant had instituted the proceedings in the magistrate's court maliciously and without reasonable and probable cause. The appellant also pleaded that as a result of the second respondent's action he had suffered damage and set out what those damages consisted of. In *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105, the Federal Court held that 'under O 18 r 19 of the RHC pleadings will only be struck out in plain and obvious cases. So long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out'. Applying what was said in the above case, I think the appellant's statement of claim abundantly disclosed a reasonable cause of action.

[21] In my view, the learned sessions court judge seems to have overlooked the fact that when considering an application under O 14 r 21(1)(a) of the SCR, no evidence is admissible. As I mentioned earlier, the reason the learned sessions court judge held that 'it cannot be said that the discretion of the Public Prosecutor to charge him (the appellant) in this case was wrongly or maliciously exercised', was because she found that the appellant was a 'consignor' of the goods. According to the sessions court judge as a consignor the appellant was caught by s 19(3) (it should be s 19(4)) as he can be regarded as a person 'using', 'causing' or 'permitting' the use of the said vehicle in breach of its licence conditions. Two points may be taken on this finding of the learned sessions court judge.

[22] The first question that must be asked about this finding is this: On what basis did the learned sessions court judge conclude that the appellant was a 'consignor' of the goods when it was never pleaded either in the statement of claim or in the respondents' defence that he was a consignor of goods? It is quite evident to me that contrary to the express provisions of O 14 r 21(2) of the SCR as well as the principle that only the pleadings are to be looked at in an application of this nature, the learned sessions court judge went beyond the pleadings and looked at the evidence adduced by the respondents in the form of the Customs Declaration to conclude that the appellant was a consignor. In so doing, she had fallen into error.

[23] Secondly, even if the appellant was named as a 'consignor' in the customs declaration form, it does not follow as a matter of course that he had no cause of action simply because he can be regarded as a person 'causing' or 'permitting' the use of the said vehicle. In my view, it may well be that even though the appellant was named as a 'consignor' yet he had nothing at all to do with causing or permitting the use of the said vehicle. Put in another way, even though s 19(4) might apply to a 'consignor' of goods, for the appellant to be caught by the section the court must still go one step further to arrive at a finding that the appellant had, as 'consignor', 'caused' or 'permitted' the said vehicle to be used in breach of its licence conditions. At this stage of the proceedings it must not be overlooked that it is not even known who signed and submitted the customs declaration form naming the appellant as 'consignor' as this was never disclosed in the form or by the respondents who produced it. Given the fact that the appellant had denied any involvement with the

said vehicle or that he knew the driver, and given also the assertion of the appellant that it was the Indonesian trader that had arranged for his own lorries and drivers to take delivery of the goods and given further that the weigh bridge ticket issued by the second respondent shows that the owner of the said lorry and the driver are from Indonesia, the court below was not in a position, without having heard any evidence on the matter, to come to the further finding that it was the appellant, as consignor, who 'caused' or 'permitted' the use of the said vehicle and therefore was caught by the section and so had no cause of action against the respondents. In my judgment there was no basis for the learned sessions court judge to strike out the appellant's claim at this stage of the case.

[24] With regard to the learned sessions court judge's finding that it was within the Public Prosecutor's sole discretion and power to charge or to withdraw a charge against a person, I do not think that the appellant was here questioning or challenging that discretion and power. Here, the appellant's cause of action is for malicious prosecution, the success or failure of which action will depend on whether or not it can be shown that the second respondent instituted or carried on the proceedings maliciously or whether there was an absence of reasonable and probable cause for the proceedings, which are questions that give rise to issues of mixed fact and law which are dependent for their resolution on all the circumstances and evidence that are disclosed at a trial. Such questions are not suitable to be decided on disputed facts in the affidavits of the parties, and certainly cannot be decided by merely looking at the pleadings only on an application under the first limb of O 14 r 21(1)(a) of the SCR.

[25] It was argued by learned counsel for the respondents before the learned sessions court judge as it was before me on appeal, that the appellant's case should be struck out as it disclosed no reasonable cause of action for two reasons: (a) since the appellant was only granted a discharge not amounting to an acquittal, the proceedings against him had only been stayed and not finally disposed off in his favour. Hence, according to the respondents, the appellant's cause of action had yet to accrue; and (b) until the criminal case against the appellant is finally disposed off, resulting in either his conviction or an acquittal, the appellant's case is premature. I regret I do not agree with this argument. It is self contradictory. In one breath, the respondents say the appellant's cause of action has not yet accrued but in another breath they maintain that there is a criminal charge instituted against the appellant but it is stayed and not finally disposed off yet. I cannot agree with the respondents' contention because the truth of the matter is that the appellant has been discharged from the offence with which he stood charged. There is no longer any charge against him or hanging over his head. It is within the right of the respondents to prosecute him for the same offence but they must re-charge him if they wish to do so. Until then, he is a free person because the proceedings in the Magistrate's Court 5 against him have terminated on his being granted a discharge. Accordingly, there is no question of the appellant's cause of action not having accrued yet or that it is premature.

[26] In the result, for all the reasons I have given, I allow the appellant's appeal against that part of the learned sessions court judge's decision that strikes out his

claim. I order that the case be remitted back to the sessions court to be tried. Since the appellant has succeeded in his appeal against the decision of the learned sessions court judge in respect of the respondents' application but failed in his appeal against the decision of the learned sessions court judge in respect of his own application, I order that each party is to bear its own costs here and in the court below.

Appeal allowed.

Reported by Loo Lai Mee